Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

Deborah W. Kane and Andrew Kane,

Petitioners,

v.

Magna Mixer Company and Paul L. Kramer,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should grant certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit that a third party defendant's unmatured indemnity claim against an original defendant cannot be brought in a later separate action but must be asserted as a compulsory counterclaim in the same lawsuit in which indemnity is sought from the third party defendant?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

CITATION OF OFFICIAL REPORTS 1

JURISDICTION 2

STATUTORY PROVISION 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 5

CONCLUSION 6

TABLE OF AUTHORITIES

Page

CASES CITED:

Answering Service, Inc. v. Egan, 1728 F.2d 1500 (D.C. Cir. 1984) 5, 6

Hall v. General Motors Corp., 647 F.2d 175 (D.C. Cir. 1980) 4, 5

STATUTES & RULES CITED:

Fed.R.Civ.P. 12(b)(6) 1, 4

Fed.R.Civ.P. 13(a) 1, 2, 5

Fed.R.Civ.P. 54(b) 3

28 U.S.C. § 1254 2

28 U.S.C. § 1332 4

PETITION FOR WRIT OF CERTIORARI

Petitioners, Deborah W. Kane and Andrew Kane respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on December 7, 1995.

OPINIONS BELOW

The District Court for the Northern District of Ohio, granted Defendants' Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) adopting a magistrate judge's report and recommendations that the doctrines of res judicata and waiver barred the assertion of indemnity claims not raised in a prior proceeding. (18a-21a). On December 7, 1995, the United States Court of Appeals affirmed on different grounds. The circuit court held that where indemnity claims have been asserted against a pleader, that pleader's unmatured counterclaim for indemnity cannot be brought in a later separate lawsuit but must be brought in the same proceeding as a compulsory counterclaim under Fed. R. Civ. P. 13(a). (1a-15a).

CITATION OF OFFICIAL REPORTS

The Opinion and Order of the United States Court of Appeals for the Sixth Circuit is reported at 71 F.3d 555 (6th Cir.1995).

JURISDICTION

Judgment of the United States Court of Appeals for the Sixth Circuit was entered on December 7, 1995. This Court's jurisdiction to consider this Petition for a Writ of Certiorari from the final judgment of the Sixth Circuit Court of Appeals is invoked pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISION

Rule 13. Counterclaim and Cross-Claim

(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon the claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

Fed. R. Civ. P. 13(a)

STATEMENT OF THE CASE

On September 22, 1988, Deborah Kane was injured while operating an industrial dough mixing machine manufactured and sold by Triumph Manufacturing Company ("Triumph"). On March 29, 1990, she and her husband filed a products liability case against Triumph's successor, Magna Mixer Company ("Magna") which had purchased Triumph's manufacturing assets pursuant to an agreement of sale which contained parallel indemnification provisions for the benefit of the seller and buyer. Magna later joined Triumph as a third party defendant raising its claims of indemnification and contribution. The case was brought in the Federal District Court for the Western District of Pennsylvania which dismissed the Plaintiffs' claims against the Defendant Magna on a Motion for Summary Judgment. (37a-43a). In granting summary judgment, the district court held that Magna could not be directly liable to the Kanes on a theory of successor liability. The district court permitted the Kanes to appeal the partial judgment pursuant to Fed. R. Civ. P. 54(b) to the United States Court of Appeal for the Third Circuit, which affirmed the district court's decision. (31a-34a). The Kanes proceeded against Triumph and obtained a money judgment. There was no adjudication of the indemnification claims that Magna had raised against Triumph.

Following the entry of judgment against it, Triumph assigned its contractual indemnification rights, which had not been previously asserted, to the Kanes who raised those rights in an action for a declaratory judgment brought against Magna in the United States District Court for the Southern District of Ohio. Jurisdiction of

the district court was based on diversity of citizenship pursuant to 28 U.S.C. § 1332. In response to the action for a declaratory judgment in which the Kanes sought to enforce Triumphs' indemnification rights as assignees of Triumph, Defendant Magna filed a Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) contending that the prior product liability action was res judicata with respect to the pending declaratory judgment case and that the Kanes had waived their right to seek indemnification from Magna by failing to raise it in the prior action.

The Federal District Court for the Southern District of Ohio granted the Defendant's Motion adopting the report and recommendation of the Magistrate Judge. (22a-30a). The Kanes appealed the decision of the district court to the United States Court of Appeals for the Sixth Circuit which affirmed but not for the reasons articulated by the district court. (18a-21a). The circuit court rejected the district court's application of principles of res judicata and collateral estoppel. (7a-10a). Instead, in a case of first impression it held that a third party defendant against whom an unmatured claim for indemnification has been made must assert a parallel counterclaim for indemnification in the same action and cannot bring it later in a separate lawsuit. (10a-13a). This holding deviates from prior decisions of the courts of appeals from other circuits considering the same point. In *Hall v. General Motors Corp.*, 647 F.2d 175, 184 (D.C. Cir. 1980), the United States Court of Appeals for the District of Columbia determined that such claims are not compulsory and may be asserted in a later lawsuit.

REASONS FOR GRANTING THE WRIT

The decision by the United States Court of Appeals for the Sixth Circuit in this case conflicts with the authority existing in other circuits. The issue under consideration involves an interpretation of Fed. R. Civ. P. 13(a) and its applicability to claims of indemnification. Unless this Court reviews the decision of the United States Court of Appeals for the Sixth Circuit there will be a lack of uniformity within the circuits on how to plead and proceed with such claims.

In *Hall v. General Motors Corp.*, 647 F.2d 175, 184 (D.C. Cir. 1980), the Court of Appeals for the District of Columbia Circuit held that General Motors' decision not to cross-claim for contribution and indemnity against Co-Defendant Larry Buick, Inc. in a personal injury case did not preclude General Motors from pursuing Larry Buick in a separate action. Writing for the Court, then-Judge Ginsburg noted:

> We do not hold that GM was compelled to meet dealer Buick's cross-claim with one of its own. If matured claims were involved, an answering cross-claim might well be compulsory. But claims for contribution and indemnity contingent upon the outcome of another claim have not been placed in the compulsory category. *Hall v. General Motors Corp.*, at 184.

Recognizing that claims for contribution and indemnity are by their very nature contingent and unmatured, the federal courts have not placed such claims in the compulsory category. A concurring opinion written by then-Judge Scalia in *Answering Service, Inc. v. Egan*, 1728 F.2d 1500, 1507 (D.C.Cir. 1984) (Scalia, J. concurring),

adopts the holding of the Court in *Hall* and concludes that a claim that depends for its success on the outcome of a lawsuit does not mature until completion of that lawsuit and should not be lost by reason of failing to plead that claim as a claim or counterclaim in the original litigation.

The decision by the United States Court of Appeals for the Sixth Circuit is not distinguishable from *Hall* in any respect and the conflicting results arrived at by the two circuits are irreconcilable on any rational basis. The Sixth Circuit simply declines to follow *Hall*, expressly noting in a footnote its disagreement with the Court of Appeals for the District of Columbia Circuit on this important procedural point. (13a, footnote). The result is a clear split in the circuits which threatens to create confusion and uncertainty for litigants, attorneys, and courts throughout the federal system unless definitive guidance is provided by this Court.

The Court should review the decision of the Sixth Circuit Court of Appeals to determine whether a third party defendant must raise an unmatured counterclaim for indemnity in the same proceeding in which a claim for indemnity has been raised against the third party defendant or whether the third party defendant may bring his indemnification claim in a separate action at a later date.

CONCLUSION

For all the reasons stated, Petitioner, Deborah W. Kane and Andrew Kane pray that this Court grant a Writ

of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

STONE & STONE

HARLAN S. STONE, ESQ.
Attorneys for Petitioner

No. 94-4001

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DEBORAH W. KANE and ANDREW KANE, *Plaintiffs-Appellants,*	)	ON APPEAL from the United States District Court for the Southern District of Ohio
v.	)	
MAGNA MIXER COMPANY and PAUL L. KRAMER, *Defendants-Appellees.*	)	

Decided and Filed December 7, 1995

Before: MERRITT, Chief Judge; KENNEDY, Circuit Judge; JOINER, District Judge.*

JOINER, District Judge. Plaintiff Deborah Kane suffered an on-the-job injury while operating equipment manufactured decades ago by a company that since has ceased manufacturing operations. This case represents Kane's second attempt to prosecute a viable cause of action against a collectible defendant. Not surprisingly, defenses of res judicata, collateral estoppel and waiver were asserted, and the district court was persuaded that res judicata barred this action. We affirm, although not entirely for the reasons stated by the district court. In

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* The Honorable Charles W. Joiner, United States District Court for the Eastern District of Michigan, sitting by designation.

doing so, we decide an issue of first impression in this court, the circumstances under which a claim for indemnity must be asserted in the lawsuit for which indemnity is sought.

I.

Triumph Manufacturing Company, an Ohio corporation, was a manufacturer of industrial dough mixers, including a mixer sold in 1948 to the Daisy Cookie Company of Pittsburgh, Pennsylvania. Forty years later, Deborah Kane, a Daisy employee, was injured while operating the Triumph mixer, and lost two fingers of one hand.

In 1984, four years before Kane's injury, Triumph entered into an asset purchase agreement with defendant Magna Mixer Company, also an Ohio corporation, pursuant to which Magna purchased Triumph's manufacturing equipment, designs, materials, implements, inventory, name and the goodwill associated with two product lines of industrial mixers. The sale was an arms-length transaction, and Triumph remained in business as a financial consulting firm for a period of time after the sale.

Only selected provisions of the asset purchase agreement are relevant to this case. The first is paragraph three, which provides that Magna "shall not assume any obligations or liabilities of the Seller with respect to the Transferred Assets or any open purchase orders with respect thereto, whether such liabilities are matured or unmatured, fixed, contingent or otherwise." The second is paragraph 12, pursuant to which the parties give each

other complementary indemnity agreements. Paragraph 12(A) obligates Triumph to indemnify Magna from "[a]ny and all claims, liabilities and obligations or every kind and description, contingent or otherwise, arising from or related to the Transferred Assets prior to the Closing hereunder." Paragraph 12(B) contains the identical provisions flowing from Magna to Triumph, except that the claims, liabilities and obligations referred to are those "arising from or relating to the Transferred Assets subsequent to the Closing hereunder."

Prior Lawsuit

In 1990, Kane and her husband filed a products liability suit against Magna in federal district court in Pennsylvania to recover for the injuries allegedly caused by the Triumph mixer. Magna filed a third-party complaint against Triumph, seeking contribution and both common law and contractual indemnity. The Kanes then amended their complaint to assert claims against Triumph directly, and set forth causes of action for negligence and strict liability against both defendants. The Kanes did not identify the basis on which they claimed that Magna bore successor liability for Triumph's design and manufacture of the mixer in question, but simply alleged that Magna was Triumph's successor.

Magna moved for summary judgment, claiming that as an asset purchaser, it was not Triumph's successor and was not liable for Triumph's pre-asset sale conduct. In opposing Magna's motion, the Kanes acknowledged that an asset purchaser generally is not liable for the debts

and liabilities of its transferor, but contended that Pennsylvania's "product line" exception to the rule against non-liability applied to Triumph's asset sale to Magna. The district court found it unnecessary to determine whether Pennsylvania law governed Magna's alleged successor liability, holding that the product line exception would not permit a finding of liability regardless. The court thus granted Magna's motion for summary judgment, and permitted the Kanes to appeal this partial judgment pursuant to FED. R. CIV. P. 54(b), while the claims against Triumph remained pending in the district court.

Before the Third Circuit, the Kanes challenged the district court's application of the product line exception and argued, for the first time, that Magna was liable to them because it had assumed Triumph's liabilities by virtue of Magna's agreement to indemnify Triumph pursuant to paragraph 12(B) of the agreement. The Third Circuit affirmed, agreeing with the district court's application of Pennsylvania's product line exception, and rejecting plaintiffs' attempt to claim that Magna had assumed Triumph's liability for Deborah Kane's injuries.

> It appears that the Kanes never raised this argument before the district court. An argument may not be raised for the first time on appeal. In any event, it is by no means clear that the provisions of the agreement support the Kanes' argument. The district court's opinion quoted paragraph three of the agreement, which suggests that Magna did not assume any of Triumph's liabilities. This passing reference by the court was not sufficient to raise the issue that the Kanes

> now advance. Nor is it apparent that the agreement granted any rights to the Kanes, who are not parties to the agreement.

Kane v. Magna Mixer Co., No. 91-3307, slip op. at 4 (3d Cir. Nov. 14, 1991) (citation and footnotes omitted).

Although Triumph's president was deposed during the pendency of the Pennsylvania action, Triumph did not answer either complaint filed against it. The Kanes obtained a default judgment against Triumph prior to appealing the summary judgment in favor of Magna. After the Third Circuit ruled, the Kanes requested a hearing on damages and obtained an award of $635,000 against Triumph. Magna did not move for a default judgment on its third-party complaint against Triumph, and the case ultimately was closed after the Kanes' default judgment against Triumph was reduced to a sum certain.

Kanes' Instant Suit as Triumph's Assignees

The Kanes were unable to collect on their default judgment against Triumph, and, in 1993, Triumph assigned to the Kanes its alleged right to contractual indemnity from Magna. The Kanes again filed suit against Magna, this time in federal court in Ohio. The Kanes did not assert a claim against Magna in their own right, instead proceeding solely as assignees of Triumph's contractual indemnity rights against Magna. Their complaint seeks a declaratory judgment that Triumph was entitled to indemnity from Magna, and that the Kanes, as assignees of that right to indemnification, are entitled to damages of $635,000.

Magna moved to dismiss the complaint under FED. R. CIV. P. 12(b)(6), claiming that res judicata and waiver barred plaintiffs' claims. On referral for report and recommendation, the magistrate judge recommended that the motion be granted, concluding that Triumph's alleged right to indemnity from Magna was a claim that could and should have been raised in the prior action by both Triumph and the Kanes, and thus was barred by res judicata. Focusing on the Kanes' status as Triumph's assignees, the magistrate judge stated that Triumph waived its indemnity claim by failing to assert it as a compulsory counterclaim under FED. R. CIV. P. 13(a), and by failing to assert the claim in response to the Kanes' amended complaint. The magistrate judge further stated that the Kanes themselves had had the opportunity to raise the asset purchase agreement in their earlier attempt to impose successor liability against Magna. The magistrate judge noted that the Kanes relied on the indemnity agreement before the Third Circuit, and stated that they were attempting to present the "same issue" in this case. The district court adopted the magistrate judge's report and recommendation over plaintiffs' objections, holding that res judicata bars all claims that were brought and could have been brought in the first action. The district court rejected plaintiffs' argument that they had not acquired their indemnity claim until after the first action was resolved, adopting the magistrate judge's view that they could have raised the argument in the first action.

II.

On appeal, the Kanes contend that their personal failure to assert an indemnity claim in the Pennsylvania

action has no effect on their ability to do so in the instant case, for the simple reason that they now sue as assignees of Triumph's contractual rights. According to the Kanes, the sole question is whether Triumph waived its indemnity claim by failing to raise it as a counterclaim to Magna's third-party claim. As to this issue, the Kanes argue that Triumph's indemnity claim was a permissive, rather than mandatory, counterclaim, and thus was not waived. Magna defends the district court's dismissal, contending that res judicata bars the Kanes' suit due to the failure of both Triumph and the Kanes to raise the indemnity claim in the first action. Magna further contends that the indemnity claim is barred by collateral estoppel.

This court reviews the dismissal of a case on claim or issue preclusion grounds de novo. *Black v. Ryder/P.I.E. Nationwide, Inc.*, 15 F.3d 573, 582 (6th Cir. 1994). Prior to turning to the central question posed by this appeal, we first dispense with two assertions made by Magna that have complicated an otherwise straightforward procedural question.

Magna contends that the Kanes' present ability to assert their assigned indemnity claim is foreclosed by *their* failure – as distinct from Triumph's – to assert this claim in the Pennsylvania action. We hold that the Kanes are not foreclosed for this reason. The doctrine of res judicata, or claim preclusion, provides that a final judgment on the merits of an action precludes the "parties or their privies from relitigating issues that were or could have been raised" in a prior action. *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). As stated by this court, res judicata has four elements: (1) a final decision

on the merits by a court of competent jurisdiction; (2) a subsequent action between the same parties or their privies; (3) an issue in the subsequent action which was litigated or which should have been litigated in the prior action; and (4) an identity of the causes of action. *Sanders Confectionery Prods., Inc. v. Heller Fin., Inc.*, 973 F.2d 474, 480 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 1046 (1993).

The proposition that the Kanes' failure to raise their assigned indemnity claim in the Pennsylvania action precludes them from doing so now founders on the third and fourth elements. The Kanes did not acquire the indemnity claim they now assert until Triumph assigned the claim to them in September 1993, eighteen months after the Pennsylvania case was closed. Simply put, the Kanes could not have asserted a claim that they did not have at the time. *Cf. Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 328 (1955) (judgment in first case cannot extinguish claims based on conduct post-dating the judgment; claims did not exist at time judgment was entered and could not have been sued upon at that time). Additionally, the district court erred in characterizing Triumph's indemnity claim against Magna, later assigned to the Kanes, as the "same issue" as that posed by the Kanes' successor liability claim against Magna. The differences between successor liability and contractual indemnity claims are significant, and pertain to, e.g., who may assert the claim, the circumstances under which liability exists, the extent of liability, and the date on which the claim accrues.[1] In

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[1] Whether an entity bears successor liability determines whether that entity can be directly liable to persons harmed by its predecessor's conduct. 19 Am. Jur. 2d *Corporations* § 2726

light of these distinctions, it cannot seriously be questioned that Triumph's indemnity claim, even as assigned to the Kanes, is fundamentally distinct from the Kanes' products liability claim against Magna as Triumph's alleged successor. Thus, the indemnity claim is not barred because of the Kanes' prior prosecution of the successor liability claim. *Black*, 15 F.3d at 582 (second claim based on separate and discrete events and wrongful acts not the same cause as asserted in prior action; res judicata did not bar second claim).

Magna further contends that the Kanes' indemnity claim is barred by the doctrine of collateral estoppel. Collateral estoppel, however, only bars relitigation of issues actually litigated and determined in an earlier

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(1986). The law will impose successor liability where the purchaser expressly or impliedly assumes the seller's liabilities, or where the corporate transaction amounts to a de facto merger, the transaction operates as a fraud on the seller's creditors, or the purchaser is a mere continuation of the seller. *Conway v. White Trucks*, 885 F.2d 90 (3d Cir. 1989) (decided under Pennsylvania law); *Flaugher v. Cone Automatic Mach. Co.*, 507 N.E.2d 331 (Ohio 1987), syllabus ¶ 1. Where successor liability is imposed, the person harmed by the seller's pre-sale conduct may sue the purchaser directly. A claim of contractual indemnity, on the other hand, exists in favor of the agreed-upon indemnitee, not the tort plaintiff. 41 Am. Jur. 2d *Indemnity* § 50 (1995). The indemnity contract governs the scope of the agreement to indemnify, and the parties are free to identify a distinct set of liabilities as to which an indemnity obligation will be imposed. *Id.* § 12. The indemnity obligation frequently will encompass collateral losses incurred as a result of being sued, e.g., attorney fees and actual costs. An indemnity claim does not accrue when the underlying tort injury occurs, but later, when the indemnity claimant suffers a loss or when a claim is asserted against it. *Id.* §§ 43-44.

action and necessary to the judgment. *Sanders Confectionery Prods.*, 973 F.2d at 480; *United States v. Berman*, 884 F.2d 916, 922 (6th Cir. 1989). The question whether Magna is contractually obligated to indemnify Triumph was neither raised nor decided in the Pennsylvania action.[2] Moreover, a determination on that issue was not necessary to the Pennsylvania court's determination that Magna did not bear successor liability to the Kanes.

With these preliminary contentions resolved, we turn to the dispositive question in this appeal: Whether Triumph's failure to assert an indemnity counterclaim against Magna prevents its assignees from pursuing the indemnity claim in this action. The parties are in agreement that the Kanes have no greater rights than Triumph would have, and that their ability to seek indemnification depends on Triumph's actions in the underlying case. Whether the indemnity claim is barred turns on FED. R. CIV. P. 13:

> **(a) Compulsory Counterclaims.** A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it

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[2] Clear evidence that Triumph's indemnity rights were not determined in the first action is found in Magna's assertion in this court that the indemnity claim has not yet accrued because Triumph did not pay the default judgment and has not yet suffered a loss. If Triumph's right to contractual indemnity had been decided in the first action, it would not be necessary for Magna to assert this argument here. We note, parenthetically, that Magna's argument lacks legal merit under the contract terms at issue. *Stengel v. Columbus*, 600 N.E.2d 248 (Ohio App. 1991); *Firemen's Ins. Co. of Newark v. Antol*, 471 N.E.2d 831 (Ohio App. 1984).

> arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. . . .
>
> **(b) Permissive Counterclaims.** A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

The Kanes argue that Triumph's claim for indemnification against Magna had not matured and would not mature until a final judgment was entered against it, and, consequently, that the indemnity claim was a permissive rather than compulsory counterclaim. We disagree. The Kanes' assertion that the compulsory or permissive status of a counterclaim is determined by whether the claim is matured or unmatured is incomplete. Under the language of Rule 13(b), a claim's status as permissive turns on whether the claim "aris[es] out of the transaction or occurrence that is the subject matter of the opposing party's claim." If the claim *does* arise out of the same transaction or occurrence, it is not a permissive counterclaim, although, as seen below, it may not be required to be asserted. Pursuant to Rule 13(a), on the other hand, a claim's compulsory status depends on whether (1) the claim arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim; *and* (2) the claim is one that the party "has" at the time that the party is to file his responsive pleading. *See Harbor Ins. Co. v. Continental Bank Corp.*, 922 F.2d 357, 360 (7th Cir. 1990) (claim which arises out of the same transaction or occurrence as opposing party's claim is not permissive

counterclaim under Rule 13(b); "the only reason it is not a Rule 13(a) counterclaim is that it did not exist when the complaint was filed.").

In determining whether Triumph's indemnity claim against Magna meets the compulsory counterclaim test, we look to Magna's third-party complaint against Triumph in the Pennsylvania case. There is no question but that Triumph's indemnity claim arises out of the same transaction as that asserted by Magna in that pleading. Magna's third-party complaint seeks contractual indemnity under paragraph 12 of the asset purchase agreement, the very same paragraph of the contract relied upon in this case. As noted, the parties' indemnity obligations are complementary, and it would be impossible to adjudicate Magna's rights without determining Triumph's as well. It is equally clear that Triumph possessed its indemnity claim against Magna at the time that Magna filed its third-party complaint. Resolution of Triumph's indemnity claim did not depend on any events that might postdate adjudication of Magna's claim but, rather, depended entirely on a transaction between the parties that already had occurred.

The Kanes argue that there was no need for either Magna or Triumph to assert an indemnity claim in the underlying action, because the outcome in that action would determine whether any such claim would be necessary. A defendant pondering the advisability of asserting an indemnity claim in the first instance might be persuaded to postpone action for this reason. *See generally* 6 CHARLES A. WRIGHT, ARTHUR R. MILLER, MARY K. KANE, FEDERAL PRACTICE AND PROCEDURE § 1411 at 82-83 (1990). We cannot agree, however, that a third-party defendant

against whom such a claim is made enjoys the same latitude in deciding whether to respond with an indemnity claim of its own. Permitting a third-party defendant such as Triumph to hold its indemnity claim in the wings, despite the assertion of a competing claim by the third-party plaintiff, would result in piecemeal litigation and a waste of judicial resources, and possibly lead to inconsistent results. Thus, we hold that once a defendant forces the issue by bringing an indemnity claim in the litigation for which indemnity is sought, the alleged indemnitor is obligated to assert its competing claims in a Rule 13(a) counterclaim.[3]

Having concluded that Triumph's counterclaim was compulsory and required to be raised in the Pennsylvania action, we need only determine the effect of Triumph's failure to do so. This court stated in another context:

> As has been pointed out by a text writer, the result that a compulsory counterclaim is barred if not asserted as required by the rule is not spelled out in the rule itself. However, this result is well established by the cases, sometimes on a theory of res judicata and sometimes on a theory of waiver or estoppel. 6 C. Wright & A. Miller, Federal Practice and Procedure, § 1417 (1971). This text prefers the waiver or estoppel theory because in some cases in which a claim is held to be barred the doctrine of res judicata does not fit and also because the waiver or estoppel theory allows more discretion not to

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[3] *Contra Hall v. General Motors Corp.*, 647 F.2d 175 (D.C. Cir. 1980).

> hold the claim is barred where to do so is manifestly unjust.

Carnation Co. v. T.U. Parks Constr. Co., 816 F.2d 1099, 1103 (6th Cir. 1987) (determining effect of failing to assert compulsory counterclaim under Tennessee rule identical to Rule 13(a)). In most instances, application of either res judicata or waiver principles will yield the same result, but, like the panel in *Carnation*, we prefer the flexibility of a waiver analysis to the more rigid rules applicable to res judicata.

Looking to Triumph's conduct in the underlying action, we find no basis to avoid the conclusion that Triumph waived its compulsory counterclaim. There is no claim of improper service or lack of knowledge on Triumph's part that the indemnity claim was pending against it. The Pennsylvania case was litigated as thoroughly as it could have been, given Triumph's failure to appear and defend. Seeking to excuse Triumph's inaction in response to Magna's third-party complaint, the Kanes contend that Magna had no incentive to litigate its indemnity claim once it succeeded in obtaining summary judgment on the Kanes' claim, and suggest that Triumph was therefore not obligated to vigorously assert its indemnity claim as a result. Even if Magna's indemnity claim became moot at this point, however, Triumph waived its competing indemnity claim months earlier by failing to raise it in response to the third-party complaint.

We are persuaded that Triumph waived its indemnity claim through its conduct of the underlying litigation, and hold that the Kanes, as Triumph's assignees, likewise

are precluded from asserting that claim. We **AFFIRM** the district court on this basis.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No: 94-4001

DEBORAH W. KANE; ANDREW KANE,

Plaintiffs - Appellants,

v.

MAGNA MIXER COMPANY; PAUL L. KRAMER,

Defendants - Appellees.

Before: **Merritt,** Chief Judge; **Kennedy,** Circuit Judge; **Joiner**, District Judge.

JUDGMENT

(Filed Dec. 7, 1995)

ON APPEAL from the United States District Court for the Southern District of Ohio at Cincinnati.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ordered that the judgment of the district court is AFFIRMED in accordance with the opinion.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

Issued as Mandate:
January 2, 1996

COSTS: NONE

Filing Fee.....$
Printing.....$
Total.....$

A True Copy.

Attest:

/s/ Teresa Bertke
Deputy Clerk

UNITED STATES DISTRICT COURT
Southern District of Ohio

Deborah W. Kane, et al

vs

Magna Mixer Co., et al

JUDGMENT IN A CIVIL CASE

Case No. C-1-94-066

Judge Herman J Weber
Magistrate Judge Steinberg

(Filed Aug. 17, 1994)

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[x] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT the Court ADOPTS the Report and Recommendation of the United States Magistrate Judge and ORDERS that defendants' motion to dismiss is GRANTED. Judgment is GRANTED in favor of defendants and plaintiffs' complaint is DISMISSED with prejudice.

Date: August 17, 1994

KENNETH J. MURPHY
Clerk

/s/ Illegible
By Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DEBORAH W. KANE, et al.,

Plaintiffs

C-1-94-066

v.

MAGNA MIXER CO., et al.,

Defendants

ORDER

(Filed Aug. 17, 1994)

This matter is before the Court upon the Report and Recommendation of the United States Magistrate Judge (doc. no. 12), plaintiffs' objections (doc. no. 13), and defendants' memorandum (doc. no. 14). The Magistrate Judge recommended that defendants' motion to dismiss be granted on the grounds of res judicata and waiver.

Plaintiffs contend that the doctrine of res judicata does not bar their present claim and that they have not waived their present claim, because they are not attempting to relitigate an issue already decided in a previous lawsuit, because the claim had not matured and was not adjudicated during the course of the litigation in the District Court in Pennsylvania, and because it is fundamentally unfair and "unworkable" to require plaintiffs to rely on Triumph Manufacturing Company, a defunct company, to preserve their claim.

Defendants argue that the Magistrate Judge correctly applied the doctrines of res judicata and waiver, since res

judicata precludes a party from litigating claims which could have been raised in a prior proceeding.

At the outset, this Court notes its agreement with the Magistrate Judge's decision to apply federal res judicata principles, rather than state res judicata principles, even though plaintiffs' present and prior cases fall under the courts' diversity jurisdiction. The United States Court of Appeals for the Sixth Circuit long ago recognized that "the scope and effect of a district court judgment in a diversity action is to be determined by federal, not state, law, 'notwithstanding a contrary state rule of *res judicata*." *Silcox v. United Trucking Service, Inc.*, 687 F.2d 848, 852 (6th Cir. 1982) (quoting, in part, *Cemer v. Marathon Oil Co.*, 583 F.2d 830, 832 (6th Cir. 1978)).

This Court agrees with the Magistrate Judge's summary of federal res judicata principles and with his application of those principles to the instant case. Specifically, the Magistrate Judge correctly stated the following:

> In this action, the Kanes present the same issues they raised in the Third Circuit. Although they now make this assertion as Triumph's assignee, the assertion is one they could have and should have raised in the Pennsylvania action. Therefore, their claims are now barred by the doctrine of res judicata.

(doc. no. 12, p. 5) (citation omitted). This analysis is proper under the preclusion law principles repeatedly recognized by the Supreme Court. *See Nevada v. United States*, 463 U.S. 110, 129-130 (1983); *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981); *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948); *Cromwell v. Sac County*, 94 U.S. 351, 352 (1876). Under these principles it is of no

import that plaintiffs are not presently attempting to relitigate issues already litigated in the prior action, since the prior final judgment bars not only claims that plaintiffs raised but also claims that plaintiffs could have raised. *See Moitie*, 452 U.S. at 398. Although plaintiffs argue that their present claim had not matured and therefore could not have been brought in the prior action, the Magistrate Judge correctly rejected this position. *See* doc. no. 12, pp. 4-5.

The Court further finds that plaintiffs' remaining contentions have either been adequately addressed and properly disposed of by the Magistrate Judge or present no particularized arguments that warrant specific responses by this Court.

Accordingly, for all of the above reasons, the Court hereby **ADOPTS** the Report and Recommendation of the United States Magistrate Judge (doc. no. 12), and **ORDERS** that defendants' motion to dismiss (doc. no. 3) is **GRANTED.** The Court further **ORDERS** that judgment is **GRANTED** in favor of defendants and plaintiffs' complaint is **DISMISSED** with prejudice.

The case is terminated on the docket of this Court.

IT IS SO ORDERED.

/s/ H. J. Weber
Herman J. Weber, Judge
United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DEBORAH W. KANE, et al.,

Plaintiffs,

vs.

CASE NO.
C-1-94-0066

MAGNA MIXER COMPANY, et al.,

Defendants

NOTICE
(Filed May 25, 1994)

Attached hereto is the Report and Recommended Decision of the Honorable Robert A. Steinberg, United States Magistrate Judge, which was filed on MAY 25 1994. Any party may object to the Magistrate Judge's findings, recommendations and report within ten (10) days after being served with a copy thereof or further appeal is waived. *See United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). Such parties shall file with the Clerk of Court, and serve on all parties, the Judge and the Magistrate Judge, a written Motion to Review which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made, along with a memorandum of law setting forth the basis for such objection. (Such parties shall file with the Clerk a transcript of the specific portions of any evidentiary proceedings to which an objection is made).

In the event a party files a Motion to Review the Magistrate Judge's Findings, Recommendations and Report, all other parties shall respond to said Motion to

Review within ten (10) days after being served a copy thereof.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Deborah W. Kane, et al.,
Plaintiffs

vs

Magna Mixer Company, et al.,
Defendants

Case No.
C-1-94-66

REPORT AND RECOMMENDATION

(Filed May 25, 1994)

This matter is before the Court for consideration of Defendants' Motion to Dismiss (doc. 3). Defendants allege that Plaintiffs' claims are barred by the doctrine of res judicata. The Court conducted a hearing on Defendants' motion on May 12, 1994. For the reasons set forth below, Defendants' Motion to Dismiss should be granted.

The facts in this matter are undisputed. Prior to 1984, Triumph Manufacturing Company (Triumph) designed and manufactured industrial dough mixers. In 1948, Triumph manufactured a type "S" slow speed industrial dough mixer and sold it to the Daisy Cookie Company.

On December 28, 1984, Defendant Magna Mixer Company (Magna) entered into an Asset Purchase Agreement with Triumph by which Magna purchased certain assets from Triumph. Triumph is now insolvent.

On September 22, 1988, Plaintiff Deborah Kane, an employee of the Daisy Cookie Company, sustained injuries to her right hand while operating the above-described industrial dough mixer. The Kanes filed a lawsuit against Magna in the United States District Court for the Western District of Pennsylvania alleging claims for negligence and strict liability. Magna denied liability and filed a third-party complaint against Triumph. The Kanes then filed an amended complaint naming both Magna and Triumph as defendants in the Pennsylvania action.

The Pennsylvania District Court entered summary judgment in favor of Magna, and the Third Circuit Court of Appeals affirmed. Triumph failed to appear in the Pennsylvania action, and the Pennsylvania District Court entered default judgment against Triumph for $634,885.45

Due to Triumph's insolvency, the Kanes have been unable to satisfy the judgment against Triumph. Triumph assigned to the Kanes its indemnification rights against Magna. The Kanes then filed the instant action against Magna seeking a declaratory judgment that the Kanes, as Triumph's assignees, are entitled to indemnification from Magna for the Western District of Pennsylvania judgment. Defendants have moved to dismiss the Kanes' declaratory judgment action as barred by the doctrine of res judicata.

RES JUDICATA BARS THE RELITIGATION OF ISSUES THAT HAVE BEEN RAISED OR COULD HAVE BEEN RAISED IN A PRIOR ACTION

The doctrine of res judicata provides that once final judgment has been entered on the merits of a case, the

parties and those in privity with them are precluded from litigating every issue raised in the earlier action as well as every issue that could have been raised in the earlier action but was not. *Nevada v. United States*, 463 U.S. 110 (1983); *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981); *Allen v. McCurry*, 449 U.S. 90 (1980); *Sanders Confectionery Products, Inc. v. Heller Financial, Inc.*, 973 F.2d 474 (6th Cir. 1992).

To ensure the finality of judicial determinations, it has been the law in this country for over a century that, when a matter becomes the subject of litigation, each party must bring his entire case forward at that time. *Cromwell v. County of Sac*, 94 U.S. 351, 358 (1877); *see also Southern Pacific R. Co. v. United States*, 168 U.S. 1, 49 (1897). The same parties may not later reopen the litigation by bringing any claim that they, due to negligence or inadvertence, omitted from the case. *Id.* A final judgment rendered on the merits "puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever." *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948).

TRIUMPH WAIVED ITS CONTRACTUAL INDEMNIFICATION CLAIM

Rule 13(a) of the Federal Rules of Civil Procedure requires that a defendant shall state as a counterclaim all claims it has against any opposing party that arise out of the same transaction or occurrence alleged in the opposing party's claim. Rule 13(a) "was designed to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common

matters." *Southern Construction Co. v. Unitd* [sic] *States*, 371 U.S. 57, 60 (1962).

In the Pennsylvania action, Magna filed a third-party complaint against Triumph alleging claims for negligence, strict liability, indemnity and contribution. *See* doc. 4, app. A. Magna attached the Asset Purchase Agreement, upon which the Kanes now rely as the basis for the indemnification claim, to the third-party complaint against Triumph. *Id.* Because Triumph's contractual indemnity claim arose out of the same transaction as Magna's third-party complaint, Triumph had not only the opportunity but the obligation under Rule 13(a) to raise its indemnification claim as a counterclaim to Magna's third-party complaint, yet Triumph failed to do so. By failing to appear and allege its contractual indemnity claim against Magna, Triumph waived its indemnity claim. *Southern Construction Co. v. United States*, 371 U.S. 57 (1962); *New Britain Machine Co. v. Yeo*, 358 F.2d 397 (6th Cir. 1966).

Plaintiffs allege that once the Pennsylvania court granted Magna's motion for summary judgment, Magna's third-party complaint became moot. Doc. 5 at 4. By failing to timely raise its contractual indemnity counterclaim, however, Triumph waived it before the Pennsylvania court granted Magna's summary judgment motion and before the Kanes obtained a default judgment against Triumph. Triumph again had the opportunity to raise its contractual indemnity claim in response to the Kane's amended complaint. Again, Triumph failed to do so.

Because Triumph elected not to raise its contractual indemnity claim in the Pennsylvania action, Triumph is

barred from raising that claim in this Court. *See Southern Construction Co.*, 371 U.S. at 60. The Kanes, as Triumph's assignees, have no rights beyond those that Triumph has. The Kane's claim for contractual indemnity based on the Asset Purchase Agreement is, therefore, barred by res judicata.

PLAINTIFFS COULD HAVE RAISED THE ASSET PURCHASE AGREEMENT IN THE EARLIER ACTION TO IMPOSE LIABILITY AGAINST MAGNA FOR THEIR INJURIES

The Kanes claim that it is fundamentally unfair to preclude them from "pursuing available insurance money merely because Triumph was unable to act." Doc. 5 at 5. They have cited no authority for their position. While it may indeed be unfair to force Plaintiffs to rely on a non-appearing adversary to raise the asset purchase agreement in the earlier action to impose successor liability directly against Magna.

According to Plaintiffs, Magna, by paragraph 12(B) of the Asset Purchase Agreement between Triumph and Magna, assumed Triumph's liabilities. Doc. 1 at para. 7. Plaintiffs claim that Triumph is entitled to indemnification from Magna for the $634,885.48 judgment imposed against Triumph in Pennsylvania for the Kanes' injuries. The Kanes, however, could have raised Magna's liability under paragraph 12 of the Asset Purchase Agreement in the Pennsylvania lawsuit.

Under Pennsylvania law, a corporation that purchases the assets of another corporation generally does not assume the liabilities of the transferor corporation.

Conway v. White Trucks, 885 F.2d 90 (3d Cir. 1989). There are several exceptions to this rule. These exceptions include the "product line" exception, where the successor corporation continues marketing the predecessor's products, and the "agreement" exception, where the purchaser expressly or impliedly agrees to assume the transferor's liabilities. *Id.* at 93; *Husak v. Berkel, Inc.*, 234 Pa. Super. 452, 341 A.2d 174 (1975); *see also Dawejko v. Jorgensen Steel Co.*, 290 Pa. Super. 15, 434 A.2d 106 (1981).

In the Pennsylvania action, the Kanes sued Magna and Triumph alleging claims for negligence and strict liability. *See* doc. 4, app. B. Magna moved for summary judgment, and the Kanes attempted to impose successor liability against Magna for Mrs. Kane's injuries. *See* doc. 4, app. E. In their brief to the Pennsylvania trial court, the Kanes specifically identified the agreement and the product line exception to successor non-liability. Doc. 4, app. E, p. 7. The Kanes chose to rely only on the product line exception and failed to raise the agreement exception. *Id.* at 7-13.

After the Western District of Pennsylvania granted Magna's motion for summary judgment, the Kanes argued on appeal, relying on paragraph 12(B) of the Asset Purchase Agreement, that "Magna is liable to the Plaintiffs because it expressly assumed the liabilities of Triumph." Doc. 4, app. H., pp. 10-12. The Third Circuit Court of Appeals rejected that argument because the Kanes had not raised it in the trial court and because "it is by no means clear that the provisions of the agreement support the Kanes' argument." Doc. 4, app. I, p. 4.

In this action, the Kanes present the same issue they raised in the Third Circuit. *See* doc. 1. Although they now make this assertion as Triumph's assignee, the assertion is one they could have and should have raised in the Pennsylvania action. Therefore, their claims are now barred by the doctrine of res judicata. The Kanes' only remaining remedy, assuming their indemnification claim had any merit, is against their Pennsylvania counsel for failing to raise the claim in the Western District of Pennsylvania.

IT IS THEREFORE RECOMMENDED THAT:

Defendants' Motion to Dismiss (doc. 3) be granted.

Date: 5-23-94
KMH

/s/ Robert A. Steinberg
Robert A. Steinberg
United States Magistrate
Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 91-3307 and 91-3665

DEBORAH W. KANE and
ANDREW KANE

v.

MAGMA [sic] MIXER CO.

v.

TRIUMPH MANUFACTURING COMPANY

Deborah Kane and Andrew Kane,

Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

(D.C. Civil No. 90-00494)
District Judge: Hon. Barron P. McCune

Argued: October 31, 1991
Before: GREENBERG, ALITO and ROSENN,
Circuit Judges

(Opinion Filed: NOV 14 1991)

MEMORANDUM OPINION OF THE COURT

ALITO, *Circuit Judge:*

1. Deborah W. Kane was injured in 1988 in Pittsburgh, Pennsylvania, by a type "S" Single Speed Mixer manufactured and sold by Triumph Manufacturing Company (Triumph). She and her husband filed an action in federal court based on diversity of citizenship against Magna Mixer Company, which purchased most of Triumph's assets in 1984. The complaint asserted claims of strict liability and negligence. Magna then filed a third-party complaint against Triumph, and the Kanes filed an amended complaint asserting claims against both Magna and Triumph. In response to Magna's motion for summary judgment, the Kanes argued that Magna could be held liable for injury caused by a mixer manufactured by Triumph under the "product line" exception to the general rule against successor liability which the Pennsylvania intermediate court of appeal has recognized. Applying the standards set out in Pennsylvania cases and in federal cases based on Pennsylvania law, the district court concluded that the "product-line" exception did not apply here and granted summary judgment for Magna. After the Kanes appealed, the district court certified its order under Fed. R. Civ. P. 54(b).

2. We hold that the district court properly granted summary judgment for Magna. While we assume, without deciding, that the Pennsylvania Supreme Court would recognize a "product-line" exception essentially as described by *Dawejko v. Jorgenson Steel Co.*, 290 Pa. Super. 15, 434 A.2d 106 (1981), we agree with the district court's conclusion that the standards for product line liability set out in *Conway v. White Trucks*, 885 F.2d 90, (3d Cir. 1985), *Dawejko*, and related cases are not met here. In particular,

we note that after acquiring Triumph's assets, Magna did not continue to manufacture the model "S" Single Speed Mixer. *See Dawejko*, 434 A.2d at 110-111 (successor must "undertake[ ] essentially the same manufacturing operation as its predecessor for the exception to apply"). *Compare Burnside v. Abbott Laboratories*, 505 A.2d 973, 987 (Pa. Super. Ct. 1985) *and Turner v. Mudrick Machine Works*, 589 F.Supp. 771 (E.D. Pa. 1984) (product-line exception does not apply for failure of this condition) *with Simmers v. American Cyanimid Corp.*, 576 A.2d 376, 387 (Pa. Super. Ct. 1990) (product-line exception would apply if relevant to the case, in part because the successor purchased the product-line and manufactured and distributed the line "in an essentially unchanged manner.") Also, Magna's acquisition of Triumph assets did not cause any persons injured by Triumph's products to lose a remedy against Triumph, since Triumph received consideration for the assets and continued to exist and to do business in another field. *See Conway, supra. See also La Fountain v. Webb Indus. Corp.*, 759 F.Supp. 236 (E.D. Pa. 1991), *motion to amend denied*, 1991 WL 45363 (E.D. Pa. 1991) and *Hack v. H.V.R. Parts, Inc.*, 742 F.Supp. 283, 285 (W.D. Pa. 1990) (product-line exception does not apply where plaintiff had a remedy against the original manufacturer in some form). *But see Amader v. Pittsburgh Corning Corp.*, 546 F.Supp. 1033, 1036 (E.D. Pa. 1982.)[1]

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[1] Although *Amader* held that destruction of remedy against the original manufacturer is not required, it does not support the application of the product line exception here. The *Amader* court would require the successor to continue to manufacture "the very same product." *Amader*, 546 F.Supp. at 1036-39. This Magna has not done.

3. The Kanes also argue that summary judgment was improper because Magna expressly assumed liability for injuries cause [sic] by Triumph's products in the asset acquisition agreement. It appears that the Kanes never raised this argument before the district court.[2] An argument may not be raised for the first time on appeal. *See NRM Corp. v. Hercules, Inc.*, 758 F.2d 676, 680 (D.C. Cir. 1985). In any event, it is by no means clear that the provisions of the agreement support the Kanes' argument. The district court's opinion quoted paragraph three of the agreement, which suggests that Magna did not assume any of Triumph's liabilities.[3] This passing reference by the court was not sufficient to raise the issue that the Kanes now advance. Nor is it apparent that the agreement granted any rights to the Kanes, who are not parties to the agreement.

Accordingly, the judgment of the district court will be affirmed.

TO THE CLERK OF THE COURT:

Please file the foregoing Memorandum Opinion.

/s/ Alito
Circuit Judge

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[2] Appellant's arguments that the district court reference to the agreement or Magna's arguments raised the issue (Reply Brief at 4) are unpersuasive.

[3] Paragraph three of the agreement by which Triumph sold assets to Magna stipulates that "[p]urchaser shall not assume any obligations or liabilities of the seller with respect to the Transferred Assets."

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 91-3307 and 91-3665

DEBORAH W. KANE and
ANDREW KANE

v.

MAGMA [sic] MIXER CO.

v.

TRIUMPH MANUFACTURING COMPANY

Deborah Kane and Andrew Kane,

Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

(D.C. Civil No. 90-00494)
District Judge: Hon. Barron P. McCune

Argued: October 31, 1991
Before: GREENBERG, ALITO and ROSENN,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued on October 31, 1991.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the District Court entered August 27, 1991, be and same is hereby affirmed.

Costs are taxes against Appellant.

Attest:

/s/ Sally Mrvos
Clerk
NOV 14 1991

Certified as a true copy and issued in lieu of formal mandate on December 6, 1991.

Attest: /s/ Illegible

Chief Deputy Clerk, U.S. Court of Appeals for the Third Circuit.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DEBORAH W. KANE and ANDREW KANE, her husband,

Plaintiffs

vs. Civil Action 90-494

MAGNA MIXER COMPANY,

Defendant

vs.

TRIUMPH MANUFACTURING COMPANY,

Third-Party Defendant

MEMORANDUM AND ORDER

BARRON P. McCUNE, Senior District Judge
April 25, 1991.

We consider a motion for summary judgment filed by the defendant, Magna Mixer Company (Magna) alleging that Magna is not liable as a matter of law and a cross-motion by plaintiffs for partial summary judgment, i.e., for a ruling that Magna may be held liable under the "product line" exception to successor nonliability in this strict liability and negligence action.

The complaint filed March 22, 1990, alleges that the wife plaintiff was employed by the Daisy Cookie Bakery in Pittsburgh, Pennsylvania, on September 22, 1988, in making cookies when she operated a type "S" Slow Speed Mixer manufactured and sold by Triumph Manufacturing Company (Triumph). She attempted to rotate an agitator in the machine as she scraped dough from the top of the

dough mixing chamber. One of the blades of the agitator caught the scraper and pulled her right hand into the machine where the index and middle fingers on her right hand were amputated.

The plaintiffs are citizens of Pennsylvania. Magna is a citizen of Ohio as is Triumph. Jurisdiction is based on diversity of citizenship.

After Magna, a successor to Triumph, brought Triumph into the case as a third-party defendant, the plaintiffs filed an amended complaint setting forth claims against both Magna and Triumph.

The amended complaint alleges that the mixer was manufactured and sold by Triumph in December of 1948.

The complaint contains six counts. Count I alleges Magna's negligence in the design and manufacture of the machine. Count II alleges the strict liability of Magna because of the defective design or construction of the mixer. Count III contains the husband's claim based on the alleged negligence of Magna. Count IV alleges the negligence of Triumph. There is no Count V. Count VI alleges the strict liability of Triumph because of defective design or construction. The last Count is also designated VI. It contains the husband's claim against Triumph based on negligence.

Discovery has been completed and the following facts have been established:

Magna purchased most of the assets of Triumph on December 28, 1984 by a written agreement. Triumph was incorporated in 1904. It had manufactured products used

in the baking business for many years, mainly two product lines of mixers called the "Horizontal and Vertical" line and the "Handy" line. Magna acquired the manufacturing equipment, materials, implements, inventory, name and goodwill associated with the lines named above.

Triumph reserved and did not sell cash, accounts receivable, contacts, vehicles and two lines of products called the "Water Cooling System" line and the "Floor Sanitary System" line. These lines apparently had not been the subject of much development.

Magna did not assume any obligations of the seller or any liabilities with respect to transferred assets, whether the liabilities were unmatured, fixed, contingent or otherwise.

No real estate changed hands. Magna moved the equipment out of the seller's building to its own. Magna paid for the equipment and the name and good will with cash and an installment note and credits against money which Triumph owed Magna. The total price was $140,000.00. The note was for $65,000.00. Credits amounted to $53,041.34 and the balance was cash.

The transaction was an arms length transaction. There was no connection between the two companies, i.e., no common stockholders or directors or officers. The credits were for ordinary work done by Magna for Triumph.

Triumph agreed not to compete with Magna for 30 months but the agreement provided that Triumph would remain a validly existing corporation under Ohio law.

Triumph continued in business at its own office as a financial consulting and mortgage brokering business after the sale, using a fictitious name, "Houston Financial." Triumph did not develop the Water Cooling System or the Flour Sanitary System finding it impractical to do so and ceased manufacturing any product.

Magna began manufacturing the mixers and advertising the Triumph name in 1985. It placed the name on mixers which it produced, beginning in 1985. It used the name on its letterheads. It sold products to Triumph's former customers. When Magna advertised a new series of mixers it advertised Triumph quality and craftsmanship, (Exhibit F to the plaintiffs' brief). When the sale took place, two employees who would have been out of work were hired by Magna. Magna did not manufacture or sell an "S type" horizontal mixer which was the type which injured the plaintiff. In the six years following the transfer, Magna has produced about 25 dough mixers. Apparently mixers have a long life or there is little demand for them.

Discussion

The plaintiffs argue that the "product line" exception to successor non liability adopted by the Superior Court in *Dawejko v. Jorgenson Steel Company*, 290 Pa. Super. 15, 434 A.2d 106 (1981), imposes liability on Magna. Magna argues that Ohio law governs the liability of the parties under the buy-sell agreement and Ohio law does not recognize the "product line" exception, but that if Pennsylvania law is applied, the "product line" exception is not applicable in this case because Triumph continued in

business as a viable corporation in good standing and the transfer did not deprive plaintiffs of a cause of action.

It is not necessary to determine whether Ohio law applies. Assuming, arguendo, that Pennsylvania law applies, the "product line" exception does not apply here. In *Conway v. White Trucks, a Division of White Motor Corp.*, 885 F.2d 90 (3d Cir. 1985), the Court of Appeals was required to predict what the Supreme Court of Pennsylvania would do in circumstances similar to Conway. The opinion predicted that the court would not apply the exception where the plaintiff had a potential remedy against the original manufacturer after a transfer of the assets. The court stated:

> [We] predict that the Pennsylvania Supreme Court, if it were to adopt the product line exception, would require the virtual destruction of the plaintiffs' remedies against the original manufacturer *caused by* the successor's acquisition. 885 F.2d 97 (underlining supplied).

The language above has been repeated in *Hack v. H.V.R. Parts, Inc.*, 742 F. Supp. 283 (W.D. Pa. 1990), *affirmed*, 925 F.2d 417 (3d Cir. 1991) and *Tracey v. Winchester Repeating Arms Company, et al.*, 745 F. Supp. 1099 (E.D. Pa. 1990) and *La-Fountain v. Webb Industries Corp.*, E.D. Pa., Civil Action 89-6069, March 5, 1991 (West' Federal Case News, April 5, 1991, Vol. 14, p. 43).

In this case the transfer did not destroy the plaintiff's remedy against Triumph which continued to do business as a corporation under Ohio law. Magna began to manufacture the products which Triumph formerly manufactured and Triumph ceased the manufacture of those products but Triumph continued to exist. In fact the

plaintiffs have sued Triumph in this action. When Paul A. Kelly's deposition was taken on January 9, 1991, he stated that Triumph was still in existence and if it chose to do so, it could have commenced manufacturing again. Kelly is the president of Triumph.

In addition to this litigation, Triumph was sued in 1985 in the Court of Common Pleas of Richland County, Ohio, at case No. 85-228-C captioned *Alexander Robinson v. Triumph Manufacturing Company* (deposition of Paul L. Kramer, President of Magna). The outcome of that law suit is unknown.

The plaintiffs in this action fear they may not be able to recover much from Triumph because according to Kelly's deposition, Triumph does not have many assets. It did not do well in its brokerage business and it has allowed its products liability insurance to lapse if it, in fact, ever had insurance, but this unfortunate situation was not necessarily caused by the transfer.

In *Conway, supra,* the plaintiff was not able to recover against the seller of a business because he had failed to timely file his claim in the bankruptcy of the seller. There was no remedy remaining except a suit against the successor, but the transfer had not caused the destruction of the plaintiffs' remedy against the original manufacturer (seller). Therefore, the "product line" exception was not applied. We conclude that it should not be applied here.

An order follows.

/s/ Barron P. McCune
BARRON P. McCUNE
SENIOR UNITED STATES
DISTRICT JUDGE

cc: Counsel of record.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DEBORAH W. KANE and ANDREW KANE, her husband,

Plaintiffs

vs. Civil Action 90-494

MAGNA MIXER COMPANY,

Defendant

vs.

TRIUMPH MANUFACTURING COMPANY,

Third-Party Defendant

ORDER

AND NOW, April 25, 1991, the defendants' motion for summary judgment is granted. The motion of the plaintiffs for partial summary judgment is denied.

/s/ Barron P. McCune
BARRON P. McCUNE
SENIOR UNITED STATES
DISTRICT JUDGE